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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

A. B. PITTMAN, TRUSTEE, NATIONAL COTTONSEED PRODUCTS CORPORATION,

Petitioner,

vs.

No. 118

UNION PLANTERS NATIONAL BANK & TRUST COMPANY, ET AL.,

Respondents.

REPLY AND BRIEF ON BEHALF OF UNION PLANTERS NATIONAL BANK & TRUST COMPANY AND CHEMICAL BANK & TRUST COMPANY TO THE PETITION OF A. B. PITTMAN, TRUSTEE, ETC., FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

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To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

PRELIMINARY STATEMENT.

The sole and single question which the petition seeks to have reviewed is an issue of fact which has been determined adversely to the petitioner on three separate occasions. The Master, before whom over four

thousand pages of testimony were taken and before whom approximately three hundred exhibits were introduced, determined the issue of fact adversely to the petitioner. The District Court determined the issue of fact adversely to the petitioner, and the United States Circuit Court of Appeals for the Sixth Circuit likewise determined the issue of fact adversely to the petitioner.

The petitioner now asks that this court grant the petition and review the voluminous record and reverse the finding of fact which has been carefully and exhaustively considered by the Master, District Judge and the United States Circuit Court of Appeals for the Sixth Circuit with the result that there was a concurrence of opinions deciding the issue of fact adversely to the petitioner.

The controversy and issue of fact grows out of the warehousing of cottonseed against which the warehouseman issued negotiable receipts. These negotiable receipts were pledged by the National Cottonseed Products Corporation to the banks as collateral for substantial loans made by the banks to the National Cottonseed Products Corporation in due course of business.

The petitioner insists that the banks should be deprived of the collateral because, according to the petitioner's insistence, the warehouseman did not have the actual, open and exclusive possession of the cottonseed, and therefore the warehouse receipts are invalid and the banks cannot claim the benefit thereof.

It is an academic proposition that in order to have a legal and effective warehousing arrangement, it is

necessary that the warehouseman have the actual, open and exclusive possession of the goods warehoused.

As stated, the Master, the District Court and the United States Circuit Court of Appeals for the Sixth Circuit adjudged for the fact that the warehouseman did have the actual, open and exclusive possession of the cottonseed. The petition for certiorari seeks nothing more than a review of this issue of fact.

The single assignment of error appearing in the petition for certiorari on Pages 24 and 25 is addressed to this one point.

The first subdivision of the assignment of error is:

> "Neither the respondent banks nor the field warehouseman ever had the actual, open and exclusive possession of the cottonseed."

The other three subdivisions of the single assignment of error are nothing more than a restatement in different language of the contention relied upon by the petitioner and just quoted.

The petitioner has no legal right to attempt to burden this court with a review of this enormous record for the purpose of investigating this issue of fact.

Alabama Power Co. v. Ickes et al., 302 *U. S.* 464.

This court said:

> "These findings were made, after hearing, by the District Judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as

unassailable. Davis v. Schwartz, 155 U. S. 631; Adamson v. Gilliland, 242 U. S. 350."

Davis v. Schwartz, 155 *U. S.* 631.

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Revised Statutes, Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

We respectfully suggest that the foregoing is a complete answer to the matters presented in the petition. We will, however, discuss briefly some of the arguments made by the petitioner.

NATIONAL COTTONSEED PRODUCTS CORPORATION.

National Cottonseed Products Corporation on January 23, 1935, while absolutely solvent, but lacking liquid assets for the prosecution of its business, filed its petition in the District Court of the United States at Memphis, seeking the benefits of the provisions of Section 77b of the Bankruptcy Act, and prayed for the appointment of a trustee to take charge of all of the assets of the petitioning Debtor, so that said assets could be preserved and protected until further proceedings could be had looking to

a plan of reorganization under the aforesaid Section. The corporation was at that time solvent.

Exhibit (D) to the petition showed assets of nearly $2,000,000.00 in excess of liabilities. (R. Vol. I, p. 2.)

On the same day the petition was filed, Honorable H. B. Anderson, United States District Judge, entered an order approving said petition as properly filed under Section 77b, adjudging that it was filed in good faith, and appointing J. E. Robertson and A. B. Pittman, Sr., temporary trustees, who were directed forthwith to take possession of all of the assets of the petitioning Debtor Corporation, in order to preserve the same for the benefit of all creditors and stockholders, pending further orders of the Court. (R., Vol. I, p. 25.)

The temporary trustees and their able counsel, within twenty-four hours after their appointment as such, and within eight days after the filing of the petition herein, reached the conclusion that the warehouse receipts pledged to three innocent banks to secure loans made in good faith for very large sums of money were fraudulent and void, and a petition was thereupon filed so averring. (R., Vol. I, p. 28; Vol. III, pp. 1716-17.)

Prior thereto, Trustee Pittman and his attorney went out to the mills and warehouses of the petitioning Debtor and there questioned Gwin, the warehouseman, " and the whole bunch out there, and all of these operators." (R., Vol. VIII, p. 1716.)

The predicate was then being laid for the the terrific assault upon the warehouse receipts involved, and upon

the entire system and scheme of field warehousing, upon which all independent oil mills of the south are absolutely dependent (R., Vol. I, p. 347-8, Master's Report); all within one week after the filing of the petition by the Debtor for reorganization, before the permanent Trustee was elected, and at a time when there was not a thought or suspicion that the Debtor was insolvent, and it was not.

The result of this attack upon field warehousing was that of making its reorganization impossible and of destroying the market value of the mills owned by the Debtor, which could not be operated except by large operators with sufficient capital of their own, such as Armour, Swift, etc., and it was they who later acquired the most valuable mills.

We are confident that the very desperate efforts of the Trustee and his attorney to impose upon these banks in order that the Trustee and his attorney might thereby be enormously benefited personally will not meet with the approval of this court.

The following fundamental facts are not disputed in the Record, nor in the brief of opposing counsel:

(1) The transactions of the three banks with the Debtor were the normal and ordinary banking transactions carried in the usual and ordinary way.

(2) The only compensation to the banks was the legal rate of interest or less.

(3) The Union Planters and Chemical made very exhaustive investigation to determine the solvency of the

Debtor before engaging in any business transactions with it, and were convinced thereof.

(4) The moneys loaned by the banks to the Debtor were borrowed by it in good faith for the purpose of carrying on the ordinary business in which it was engaged, and were so used.

(5) Union Planters and Chemical Bank had no financial interest in the Debtor, nor did any of its officers or directors, nor had said banks at any time sold or offered for sale any of the Debtor's stock or bonds, and, therefore, had no reason or inducement to bolster the credit of the Debtor or keep it in business or deal with it otherwise than on a sound and ordinary banking basis.

The petitioner makes the often repeated statement in the petition that the National Cottonseed Products Corporation, at the time of the filing of the petition for reorganization under Section 77b of the Bankruptcy Act, and for months theretofore, was insolvent. The plain implication of the petition is that the banks were doing business with an insolvent corporation, largely known to the public to be insolvent. Such was not the case. The petition, however, dwells upon and deals constantly with charges of insolvency.

The District Judge found for a fact that the National Cottonseed Products Corporation was solvent. In his decree he stated:

> "The bankrupt was solvent during the four months prior to the petition, and the Master's finding to the contrary is reversed and set aside. The exceptions of the respective banks to the Master's finding that

> the National Cottonseed Products Corporation was insolvent during the four months period are sustained." Tr. 279.

The Circuit Court of Appeals also found for a fact that the corporation was solvent, and stated:

> "We accept the adjudication in the decree that the bankrupt was solvent at the time of its alleged preferential payments and transfers to the appellees."

In the lower courts the Trustee charged that the banks had received certain preferential payments, but that position has now been abandoned by the Trustee, as there is no assignment on this subject in the petition for certiorari.

The petition assigns no error to the conclusion of the Circuit Court of Appeals that the corporation was solvent. It therefore is a fact judicially established that the corporation was solvent but the petitioner continues to argue to the contrary.

Obviously, the petitioner's often repeated charge of insolvency is without foundation and is intended to create a background or atmosphere for the vigorous insistence that the Master, the District Judge and the Circuit Court of Appeals all erred in concluding and finding that the warehouseman had the open and exclusive possession of the cottonseed.

We address our remarks immediately at this point to the possession of the cottonseed which the warehouseman in fact actually and notoriously and openly did have.

Speaking of the seed houses in which the cottonseed was stored and guarded by the warehouseman, the Master found and reported:

> "Adequate signs of a large size were placed upon these buildings, valid leases were taken, local warehousemen were placed in charge of each mill rendering daily reports to the Memphis office, and performed the duty, and this record dicloses no instance in which they neglected to *perform their duty;* a central control warehouseman was in charge at Memphis, who received the daily reports with all necessary information of the operation at each mill, and who kept a central control record, and account, of the property on hand and the warehouse receipts issued by him against it, and upon the whole record, I think that actual, open and exclusive possession of the cottonseed was had within the requirements of the decisions.
>
> "The record shows without dispute the chief control warehouseman at Memphis was active in the discharge of his duties and was constantly supervising the whole system and was in actual charge and control, standing guard between the National and the holders of the warehouse receipts. There was no evidence that he was inactive or perfunctory in the performance of his duties. He was at all times present and performing them. On December 2, 1934, he ordered the mills to cease crushing seed when there was a shortage due to the failure of warehouse receipts to be received promptly from the Reconstruction Finance Corporation, at Nashville, and the mills closed until the receipts were received and cancelled.
>
> "This control of the property was recognized and respected by the National.
>
> "Upon consideration of all the evidentiary facts herein found and stated I am unable to view them other than that the Warehouse Company had the nec-

essary legal possession of the cottonseed-houses and the exclusive charge and control of the cottonseed contained therein under the decisions defining the law applicable to the relationship of the parties; and, upon the whole record, that the outstanding warehouse receipts for cottonseed are valid." Tr. 369, 370.

The District Judge found and decreed for a fact that the warehouseman had the actual, open and exclusive control and possession of the cottonseed-houses and the cottonseed stored therein. The decree recites in part:

> "The warehouse receipts on cottonseed are found to be valid and lawful in all respects. There was on hand with the warehouseman at the time the petition was filed sufficient cottonseed to meet and fulfill all outstanding cottonseed receipts. The finding and conclusions of the Master to the same effect are confirmed and the Trustee's exceptions thereto are overruled." Tr. 279.

The Circuit Court of Appeals reached the same conclusion and in this language:

> "The appellant concedes that field warehousing may validly be carried on, and that the issue of warehouse receipts will afford valid security to the holders when the warehouseman takes and maintains sole, open and actual possession of the stored property. He contends that this was not true of the present system and assails the warehousing as merely colorable.'
>
> * * *
>
> "The master found, however, in findings sustained by the court, that the seed was delivered to the Warehousing Company; that adequate signs were placed upon the buildings; that local warehousemen were in charge at each mill, rendering daily reports to the

central control warehouseman in charge at Memphis, who kept an adequate control record of the property on hand; and concluded upon the whole record that the Warehousing Company was in actual, open and exclusive possession of the cottonseed. There was no evidence of an inactive or perfunctory performance of the duties of the warehouseman or his aides, and the bankrupt at all times recognized his authority. There was never any actual shortage between cottonseed on hand and receipts outstanding. The apparent shortage that seemed to have been indicated by the reports was fully explained to the satisfaction of both court and master as having been due to a delay in mail delivery of warehouse receipts from the mills to the main warehouse office in Memphis. When the shortage did appear, the warehouseman, at least on one occasion, required the closing of the mills until the receipts were received and cancelled.

"Upon these concurrent findings of court and master, it is our conclusion, in the absence of clear demonstration of error, that the warehouse receipts were valid and afforded security both to the Reconstruction Finance Corporation and to the banks. Union Trust Co. v. Wilson, 198 U. S. 530. The law of Tennessee does not require a contrary view. Bank of Rome v. Haselton, 83 Tenn. 216. The Tennessee cases cited as authority for the doctrine that there may be no lien on personal property consumed by use or exhausted by sale are not applicable, since there was no withdrawal here, except upon surrender and cancellation of receipts. Nor are decisions apposite dealing with warehouse receipts on goods which are not fungible, such as Interstate Banking & Trust Co. v. Brown, 236 Fed. 32 (C. C. A. 6). While the Uniform Negotiable Receipts Act provides that the receipt shall state the location of the warehouse in which the goods are stored (Williams Tennessee Code, Sec. 7533-a), such alteration as is here complained of is permitted (Tennessee Code, 1932, Sec.

> 7544), when, as found by the master, the holder has agreed to accept delivery at other points.
>
> "As pointed out in Union Trust Co. v. Wilson, supra, the form adopted might be emptied of significance by a different understanding between the parties which the form was intended to disguise. This record is barren, however, of any such different understanding, and the charges of collusion, fraud and bad faith, though made with great insistence by the trustee, wholly fail of support, and the master so found."

The petitioner asks that this court take in this very large record for the purposes of review and that the concurrent finding of fact of the lower courts be set aside. Such a request cannot find support in any of the cases and is at variance with the practice of this court on certiorari petitions.

FIELD WAREHOUSING.

Field warehousing is quite common. It is no different from the ordinary warehousing arrangement other than that the warehouseman has taken possession of a "field" or a particular building or piece of property on or in which bulky goods are stored and against which the warehouseman has issued his negotiable receipts.

Field warehousing has had the universal approval of all the courts for such a long time that it is unnecessary to review the origin and history of the system.

It, of course, is true that in field warehousing, just as in the ordinary, common warehousing arrangement, an essential requisite for valid and legal warehousing of the

goods is that the warehouseman be in actual, open and exclusive possession of the goods warehoused.

Each case is dependent upon its own facts. The petitioner has made the bold and startling statement that "the various applications of the rule there announced have resulted in uncertainty and conflicts in the various circuits, and the decision in this case has resulted in a conflict between the Sixth Circuit and other Circuits, namely, the Second, Third, Fourth and Seventh Circuits." Petition, p. 9.

This bold statement is entirely unwarranted. Each case involving field warehousing as well as the ordinary warehousing, presents the question of whether or not the warehouseman had posession of the goods. Each case turns upon its own facts and presents an issue of fact. In some of the cases the factual investigation by the court has led the court to the conclusion that the warehouseman did have the required possession of the goods, while in other cases, the court reached the conclusion that the warehouseman did not have the required possession of the goods.

The petitioner's statement of an alleged inconsistency of decisions, translated into simple language, means that the facts in the different cases, of course, vary with the result that the courts have reached conclusions of fact in some cases approving the warehousing arrangement and disapproving it in other cases because of plain and important differences in the factual background of the warehousing system under investigation The distinction is well illustrated by a brief consideration of two decisions of this court. There is no uncertainty about

the law. In reality, there is no difference among counsel about the law applicable to field warehousing. The only difference among counsel is with respect to the conclusions of fact. All of the lower judicial bodies have adjudged that the warehouseman did have the possession, and therefore the petition presents to this court the question of whether or not this court will undertake a review of this record to determine if the factual conclusions are correct.

A case in which this court considered field warehousing and concluded that the warehouseman had possession of the goods is:

Union Trust Co. v. Wilson, 198 *U. S.* 530.

This case was decided in 1905 in an opinion rendered by Mr. Justice Holmes. The Circuit Court of Appeals certified to this court certain questions for answer. The facts were:

> "The bankrupt, Flanders, was a wholesale leather dealer. He walled off a part of the basement of his place of business, and let at a nominal rent to the Security Warehousing Company. There were doors to this part, with padlocks bearing the name of the company, which were kept locked, and to which the company had the only keys. The company had a key to Flanders' front door, and access to the part let to it at all hours or day or night. No one else could get such access without breaking in. There were two signs on the outside, stating, in large letters, that the premises were occupied by the company as a public warehouse. The company received leather from Flanders into this place, issuing a certificate that it had received the same on storage, subject to the order of H. L. Flanders & Co., and identifying the

leather; "said commodity to be retained on storage, and delivered only upon surrender of this receipt, properly indorsed, and payment of all charges thereon."

* * *

"If Flanders desired to remove any part of the leather, he paid the necessary sum to the trust company, was intrusted with the receipts, got the warehouse company to send a man to unlock the place of enclosure and allow the removal, indorsing on the receipt the amount delivered, if less than all, and then, as the case might be, return the receipt to the trust company or surrender it into the warehousing company's hands.

"Flanders became bankrupt, and his trustee filed a bill in the district court, alleging the storage arrangement to have been fraudulent, and claiming the leather on the ground that it always had been in the possession of Flanders, and therefore had come to the possession of the trustee.

* * *

"A bailee asserting a lien for charges has the technical possession of the goods. But it always is recognized that if the bailee of the owner, by direction of the latter, assents to becoming bailee for another, to whom the owner has sold, mortgaged, or pledged the goods, the change in the character of the bailee's holding satisfies the requirement of a change of possession to validate the sale or pledge."

This court concluded:

"But there can be no doubt on the facts as stated, without more, that the company (the warehouseman) had possession of the goods. It had them under lock and key, in a place to which it had a legal title and right of access by lease."

This court also said:

> "Where there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, there are all the elements of possession in the fullest sense."

As the warehousemen had possession of the goods, this court approved the field warehousing arrangement.

By way of contrast and to point out a case where the warehouseman did not have possession of the goods, with the result that the receipts and warehousing arrangement were struck down, we invite attention to another decision of this court.

Security Warehousing Co. v. Hand, 206 *U. S.* 415.

The Referee took the proof and concluded that the warehouseman did not have the requisite possession of the goods. This conclusion was affirmed by the district and appellate courts, and was likewise affirmed by this court.

This court's opinion directs the reader to the opinion of the Circuit Court of Appeals, 143 Fed. 32, for a statement of the case. Before taking up the opinion rendered by this court, we direct attention to the facts appearing in the Circuit Court of Appeals' opinion.

The Racine Knitting Company, the bankrupt, leased to the warehouseman certain space and rooms on the first and second floors of the premises of the bankrupt.

The Circuit Court of Appeals described the condition in the following language:

> "At Stevens Point the inclosure was in the knitting company's own warehouse, which was openly occupied and used by it after the lease as well as before. No signs on the building or on the door leading into it announced the presence of the security company. The inclosure in one corner of the building was of slats, between which the packages of goods inside could be seen. No signs regarding the security company's possession were placed on the outside of the inclosure in 1901 nor at any time until in September, 1903, very shortly before the bankruptcy proceedings were begun, when the district manager of the security company came from Chicago, and changed a sign from inside, over the door, to outside, on the door. The signs inside were ambiguous, in that they referred to bins and chutes, and much of the time were not to be seen on account of the piled-up goods. The security company's agent, on the ground to maintain an open, unequivocal and exclusive possession, was the cashier of the knitting company, who had charge of the stock and of shipping. The key to the inclosure was kept on a ring with other keys used in the business of the knitting company; and this bunch of keys was accessible to the manager of the knitting company, and was left at the office during the cashier's absences. Substantially the same conditions obtained at Racine.
>
> "If a creditor desired to look over the property of the knitting company, what would be the probable result? The cashier or shipping clerk or manager could take the bunch of keys, unlock the warehouse, show the raw materials, and broken stock outside of the slatted inclosure, point out the quantity of goods within the inclosure, explain the necessity of the inclosure to prevent pilfering of the hosiery, etc., when the warehouse was open; and nothing would

> warn the creditor of the deception. And the evidence satisfies us that at least one creditor was so deceived."

Now, turning to the opinion of this court rendered by Mr. Justice Peckham, some of the interesting remarks of this court are:

> "The findings show that the receipts of the warehousing company were not entitled to the status of negotiable instruments, the transfer of which operates as a delivery of the property mentioned in them."

In the case at bar the receipts are negotiable, and there is no dispute about this.

This court also said in *Security Warehousing Co. v. Hand*:

> "There was scarcely a semblance of an attempt at such change of possession from the hands of the knitting company to the hands of the warehousing company."

In the case at bar there is not the slightest doubt that the National Cottonseed Products Corporation surrendered to the warehouseman, and without the slightest reservation, the seed houses and the cottonseed stored therein.

This court further said in *Security Warehousing Co. v. Hand*:

> "The alleged change was a mere pretense, a sham."

In the case at bar the change was realistic and the warehousing arrangement was a genuine and bona fide one as distinguished from a sham, and as shown by the concurrent opinions of the courts below.

In *Security Warehousing Co. v. Hand,* this court further stated:

> "No signs were displayed to the passer-by."

The record in this present appeal shows without dispute that the warehouseman placed and maintained at all times on the seed houses large, prominent signs visible to passers-by, that the warehouseman was in possession of the seed houses and contents.

This court concluded that the warehouseman in *Security Warehousing Co. v. Hand* did not have the requisite possession, that the warehousing arrangement was a fiction and without reality, and therefore struck down the warehouse receipts and the alleged warehousing arrangement.

This court stated:

> "The actual transactions in the case at bar differ radically from the facts as stated in Union Trust Co. v. Wilson, supra. The court there held that there was sufficient proof to show a change of possession," etc.

There is a vast and important difference between the facts in Union Trust Co. v. Wilson, where the warehouseman had possession, and the facts in Security Warehousing Co. v. Hand, where the warehouseman did not have possession. We respectfully submit that in the case at bar, the lower courts had an overwhelming and convincing amount of proof to sustain the conclusion that the Nashville Warehouse & Elevator Corporation did have the actual, open and notorious possession of the seed houses and contents, with the result that the receipts issued against the seed were and are valid.

THE WAREHOUSEMAN'S DUTIES.

On page 16 of the petition a misleading and unwarranted statement is made:

> "In the fall of 1934 the warehouse company required of the bankrupt a written agreement expressly relieving the warehouse company of every duty of a warehouseman."

Citation of the record is a sufficient answer to this extreme and unwarranted statement. The Master (T. 344) states:

> "That cottonseed has a tendency to heat and thereby spoil and it is the safer course to crush them as promptly as possible."

He then explains the reason for the contract of November 27, 1934, between the corporation and the warehouseman, and points out that the contract was intended to relieve the warehouseman from risk or liability because of the seed heating, etc.

> "On November 27, 1934, National and the Warehouse Company entered into a written agreement (Exh. 33) by which it was provided that the storing of cottonseed was hazardous and the Warehouse Company did not desire to take the risk of deterioration of the seed and obligated the National to protect the Warehouse Company against any loss, cost or damage arising from the storage of said seed except for the wilful neglect or default of the Warehouse Company, it obligated the National to inspect the seed at convenient intervals for the purpose of ascertaining the said seed was in good condition and not deteriorating or becoming less valuable and to pay for all deterioration for which the Warehouse Company may be liable; to ascertain any shrinkage in

> weight which may be occasioned by storage and in the event of any such shortage to make the same good by delivery of necessary seed or pay the value in cash." Tr. 345.

It is not unusual for a warehouseman to contract against liability for damage or loss resulting from fire, act of God, or inherent qualities of the goods stored.

In *Union Trust Co. v. Wilson,* supra, this court pointed out and approved the contractual arrangement between the bailor and the warehouseman relieving the warehouseman from liability in the event of certain contingencies. This court stated:

> "The company (warehouseman) stipulated in the receipt aginst liability for damage by fire, water, etc., and by a general contract with Flanders, the latter assumed all risk of loss except from dishonesty of the company's servants."

In view of our undisputed record and the common practice of warehousemen in such matters, is it a fair statement for the petitioner to assure this court that the contract of 1934 expressly relieved "the warehouse company of every duty of a warehouseman"? The petition contains many other equally extravagant and extreme statements, but reasonable limits for this response will not permit us to deal with each in detail.

Another illustration of the somewhat erroneous statements appearing in the petition is the following:

> "Although the warehouse receipts (conforming on their face to the requirements of the Negotiable Warehouse Receipts Act) designated the quantity called for by the receipt, the town and state in which

> the seed or products was located, and the warehouse number—the banks, the bankrupt and the warehouseman utterly disregarded all this and after this litigation started, claimed that they had an agreement whereby warehouse receipts could be outstanding and held as collateral calling for seed or products at a specified mill, when in fact there were no seed or products there, provided there was excess seed or products at some other mill in some other town, or in some other state." Petition, p. 21.

The plain implication of the above is that after the litigation started, the warehouseman and the banks trumped up some understanding which had not theretofore existed in fact. Such was not the case. The arrangement and the understanding prior to the litigation was so notorious that even the Trustee and his counsel knew of it with the result that they stipulated before the Master that it in fact had existed and was commonly known. The Master's report contains the following:

> "It was stipulated at the hearing that at different times and at particular mills there was a shortage which was taken care of by an overage at other mills, pursuant to the agreement and understanding between the parties, the Warehouse Company and the National, with the further agreement between them that any overage anywhere would be applicable to any shortage at any of the mills." Tr. 346.

THIS FIELD WAREHOUSING ARRANGEMENT AND ACTIVITY WAS IN EFFECT FOR MANY YEARS PRIOR TO THE FILING OF THE PETITION FOR REORGANIZATION AND WAS KNOWN GENERALLY TO THE TRADE.

Without elaboration, we point out that this field warehousing system now under attack was in effect for many years prior to the filing of the petition for reorganization in January, 1935, and that millions of dollars were loaned by other lending agencies such as Reconstruction Finance Corporation, Procter & Gamble, etc., against its receipts, and it was a matter of common knowledge that the National Cottonseed Products Corporation operated under a field warehousing system and borrowed money on the warehouseman's receipts. Obviously, no one could have been deceived.

The banks did, in 1934, exactly what the Reconstruction Finance Corporation had done for two prior years.

The Master's report describes the earlier history of the warehousing arrangement, and directly refutes and repels the petitioner's sinister implication that reputable warehousing companies and conservative lenders of money would have nothing to do with the receipts and the warehousing system. The petitioner's position, statements and insistence are pure fiction, and are emphatically refuted by the record.

> "The claimant Banks take the position that cottonseed is a fungible commodity, both as a matter of fact and by custom of the trade, and segregation was unnecessary and the proof is undisputed that cottonseed is so treated in the trade.
>
> "The claimant Banks take the position that field warehousing in the cottonseed oil mill trade is well

established and is being conducted substantially in accord with the system adopted by the parties on this record and introduced cottonseed oil mill operators, showing that field warehousing is extensively employed.

"The claimant Banks insist that the signs put up on the leased seed-houses were adequate to direct the attention of creditors and the public to them, were placed in conspicuous locations and could be read 200 or 300 feet away; that the signs were approved by at least five parties who had been interested in the warehousing from the time of its establishment in 1929 to the filing fo the petition in this cause; first by Procter & Gamble Company in 1929 when the Union Compress & Warehouse Company was the warehouseman; again when the Warehouse Company succeeded the Union Compress & Warehouse Company; when the Warehouse Company was acting as such for the Reconstruction Finance Corporation in 1933 and 1934 and again when the President of the National was acting on behalf of Procter & Gamble in 1929.

"It was shown that a warehousing system for the purpose of enabling oil mills to pledge cottonseed to secure advances is widespread over the country and has been for a number of years; that the Warehouse Company was engaged in that service for at least eight other Companies during the 1934-35 season; a map was exhibited showing the location in various states in the South of twenty independent oil mills using the system; it was shown that the use of field warehousing by the National continuously since 1929 *had become common knowledge in the cottonseed oil trade.*

"Claimant Banks concede on the Brief that the physical process used in running the mills continued exactly the same after the warehousing system was set up as before, and take the position that the entry into the cottonseed-houses under lease on the part

> of the National's employees for operating purposes or otherwise was entirely a permissive entry; that the Warehouse Company had control of the leased premises and that this control was recognized and respected by the officers of the National." Tr. 347, 348.

This warehousing system has had the approval of the Reconstruction Finance Corporation as well as everyone interested, including the able counsel who represented those who loaned money to the National prior to the respondents making the loans here involved. Everyone has recognized the legality of the receipts and the warehousing system other than the petitioner, who hopes to take from the banks collateral and thus profit enormously for himself and counsel at the expense of the banks which loaned the money in the utmost good faith.

CONCLUSION.

In the courts below there were a number of questions of law and fact. All are now determined except the one presented in the petition.

One of the questions below was the legality of receipts issued on products. Products from cottonseed are oil, linters, hulls, meal and cake. The courts below decided that the receipts on products were invalid as the warehouseman did not have the requisite possession of products. The question therefore was decided adversely to the banks, and the Trustee has benefited at the expense of the banks to the extent of approximately $140,000,000.

The petition refers in a number of places to the findings about products and the warehousing of products, which is to be distinguished from the warehousing of cottonseed. Such references to the findings about products are quite misleading and immaterial here.

The products were not stored in the cottonseed houses, but at other places. They were stored in and about the crushing mills and other premises of the National in no way under the control of the warehousemen. There were no signs warning the public that any products were warehoused. In fact, the warehouseman did nothing about the products and exercised no control or possession over them with the result the products receipts were declared invalid. The Master said:

> "The evidentiary facts disclose that the oil was stored in tanks, linters in houses and on platforms, hulls in houses, and meal and cake usually in the

main mill buildings; that the places where the meal and cake was stored were not separated from the other portions of the mill building by any means, nor were they tagged or marked in any manner; nor was the portion under warehouse receipt segregated from the mass on hand.

* * *

"However, whatever may be the findings on the element of possession, it is conceded on this record that prior to the institution of the present proceedings no signs giving notice of the warehousing of cottonseed products were printed and posted upon the oil tanks, the linter houses and platforms, hull houses and meal and cake storage spaces.

* * *

"The failure of notice described is suffiicient by itself, regardless of the existence of all other elements, to defeat the validity of warehouse receipts for cottonseed products and invalidity is found as a fact." Tr. 370, 371.

The banks admitted in the beginning that the products receipts were invalid as the warehouseman had no possession of the products, but endeavored to claim the products under principles of equitable liens, as the banks had loaned large sums against the product.

The Circuit Court of Appeals rejected the argument and adjudged to the Trustee the products.

This explanation is given so that the warehousing arrangement for products will not be confused with that for cottonseed. They were entirely different. The Master discusses the differences fully in his report beginning on Page 386 of the record.

We respectfully submit that the Master, the District Judge and the Circuit Court of Appeals had an abundance and overwhelming amount of evidence to sustain their concurrent conclusions that the warehouseman had the open, notorious and exclusive possession of the cottonseed, with the result that the receipts thereon are valid.

We respectfully submit that the petition for certiorari should be denied. There is no practice known to the respondents which permits a petitioner to request that this court review an issue of fact, particularly in a record so large as this, where the issue of fact has been concurrently decided and settled so emphatically in all the courts below.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

A. B. PITTMAN, TRUSTEE, NATIONAL COTTONSEED PRODUCTS CORPORATION,
Petitioner,
vs.
UNION PLANTERS NATIONAL BANK & TRUST COMPANY, ET AL,
Respondents.

No. 118.

REBUTTAL BRIEF ON BEHALF OF PETITIONER.

LOWELL W. TAYLOR,
LARRY CRESON,
Attys. for Petitioner.

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To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The two reply briefs filed on behalf of the three banks do not attempt to meet and controvert the primary and evidentiary facts relied upon by petitioner. They attempt to foreclose a consideration of this case by categorical and very positive statements that the petition seeks to present for review a question of fact. This seems to be the major point of difference between petitioner and the respondents.

Let it be conceded here and now that if the petition for certiorari presents for review a question of fact, it was ill-advisedly filed and is not entitled to consideration.

Petitioner relies upon the primary and evidentiary facts found which establish that, despite all of the forms gone through, neither the warehouseman nor the banks ever had the possession of the cottonseed requisite to support a valid lien.

The major difference seems to be that petitioner regards the conclusions reached by the lower tribunals as either questions of law or mixed questions of law and fact, while the respondents, for the purpose of foreclosing the issue, insist that those conclusions are findings of fact. Before dealing specifically with this difference of opinion, we believe it well to direct attention to the rule as very recently announced by this Honorable Court in *Bogardus v. Commissioner of Internal Revenue,* 302 U.S. p. 34, 82 L. Ed., p. 32, wherein it was said:

> "The Board of Tax Appeals concluded that, from a careful consideration of the evidence, 'the payments made by Unopco to the petitioners and others were additional compensation in consideration of services rendered to Universal and were not tax-free gifts.' This, as we recently have pointed out, is 'a conclusion of law or at least a determination of a mixed question of law and fact. *It is to be distinguished from the findings of primary, evidentiary or circumstantial facts.* It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board.' Helvering v. Tex-Penn Oil Co. 300 U. S. 481, 491, 81 L. ed. 755, 762, 57 S. Ct. 569; Helvering v. Rankin, 295 U. S. 123, 131, 79 L. ed. 1343, 1349, 55 S. Ct. 732. *If the conclusion of the board be regarded*

> *as a determination of a mixed question of law and fact, it has, as we shall presently show, no support in the primary and evidentiary facts.* The ultimate determination, therefore, should be overturned, under the doctrine of Helvering v. Rankin, supra, as a matter of law." (Italics ours.) 82 L. Ed. 32, at p. 38.

This ruling was followed by the United States Circuit Court of Appeals for the Seventh Circuit in *Exmoor Country Club v. United States*, 119 F. (2) 961. In that case the Court said:

> "(1) In this case the facts are not in dispute. The problem is one of construction, i.e., the application of the taxing statute. In such situations, where the ultimate finding is a conclusion of law, or at least a determination of a mixed question of law and fact, it is subject to judicial review, and on such review the appellate court may substitute its judgment for that of the trial court. Bogardus v. Commissioner, 302 U. S. 34, 39, 58, S. Ct. 61, 82 L. Ed. 32 and Deputy et al v. Du Pont, 308 U. S. 488, 499, 60 S. Ct. 363, 84 L. Ed. 416." 119 F. (s) 961, at p. 963.

The pivotal question as presented by the briefs submitted to this Honorable Court seems to be: viz, Is the question of possession one of law, or at most, a mixed question of law and fact? If it is either, then the petition is well founded, otherwise, there is no merit in it.

It will be observed from the reply briefs filed on behalf of the respondents that all respondents have treated the conclusions reached by the lower tribunals as findings of fact, without any regard to the findings of primary or evidentiary facts found by the Master, which have never been disputed by respondents and are not now disputed by them.

The respondents say that because the lower tribunals have concluded that the taking of leases, the affixing of signs, the appointment of custodians, the requirement of bonds, the keeping of records, the issuance of receipts, the reporting by custodians at the various mills of the quantities on hand from the bankrupt's records, the keeping of records by the central control warehouseman located in Memphis, Tennessee, was sufficient to constitute "actual, open and exclusive possession" of the cottonseed, the petitioner is concluded by a finding of fact which is not subject to review in this Honorable Court.

Petitioner's insistence is that, conceding all of the evidentiary facts there enumerated to be true, the conclusion that there was an "actual, open and exclusive possession" of the cottonseed is erroneous because,—despite the existence of those facts,—the primary and evidentiary facts are, that although the leases provided for an annual rental, no rent was ever paid; although the leases provided for walling off the spaces in which warehouse products were to be stored, no spaces were ever walled off; that the custodians or so-called warehousemen were regular employees of the bankrupt, who devoted all of their time to the business of the bankrupt, except for about thirty minutes a day, when they made a report of the quantities on hand, taken from the records; that all of the custodians and the central warehouseman were paid by the bankrupt, as well as all other expenses of the warehousing arrangement, and the following additional facts found and reported by the Master:

> "The National bought, paid for and acquired the title to all cottonseed which came into its possession and stored in the seed-houses.

> Unless and until warehouse receipts were issued the National had the right to crush and use the entire seed inventory, unaffected by any provision of the warehousing agreement.
>
> Prior to the issuance of warehouse receipts the cottonseed was stored in the various seed-houses. After receipts were issued there was no change of actual possession. Operations continued exactly as before and the seed was handled exclusively by National's employees.
>
> The Warehouse Company had no employees stationed at the plants of the National who took any part in the handling of the seed from the time the seed were received and placed in the seed-houses and the products were shipped out." (Master's Rep., Vol. 2, p. 350.),

and not only was the bankrupt left in actual possession of the cottonseed, but it was understood and agreed, and the entire arrangement contemplated, that the bankrupt should crush the cottonseed to meet its daily operating requirements and sell the products in the ordinary course of its business. All this is fully set out in quotations from the Master's findings in the brief supporting the petition for certiorari.

It is petitioner's contention that this Honorable Court has already found, and it is the settled law in Tennessee, that, despite the primary facts upon which the lower tribunals have concluded that there was an "open, actual and exclusive possession" by the warehouseman (which respondents insist upon characterizing as a finding of fact), there was no such possession because all of the forms gone through were disregarded, and the primary and evidentiary facts disclose and impel the conclusion that the warehouseman never did have any possession, either open, actual or exclusive.

It will be noted that in neither brief filed by the respondents do they advert to or quote from the evidentiary facts found. In the brief filed on behalf of the Union Planters National Bank & Trust Company, et al, they quote the Master's summary, which follows his express findings, and rely upon his conclusion, viz,—

> "* * * I think that actual, open and exclusive possession of the cottonseed was had within the requirements of the decisions."

And:

> "* * * Upon consideration of all the evidentiary facts herein found and stated I am unable to view them other than that the Warehouse Company had the necessary legal possession of the cottonseed-houses, etc." Their brief, p. 9.

And they quote from the opinion of the Court of Appeals, in which the Court shows clearly that it rested upon the Master's erroneous conclusion. The quotation from the Court of Appeals' opinion says that the Master—

> "* * * concluded upon the whole record that the Warehousing Company was in actual, open and exclusive possession of the cottonseed."

The reply brief filed on behalf of the American National Bank relies upon the same conclusions found by the Master and the lower courts.

Neither brief attempts to controvert the evidentiary facts found, to which neither respondent filed exceptions.

It is petitioner's earnest insistence that since this Honorable Court has held that a lien cannot be sustained simply because a so-called field warehouseman

takes leases, appoints custodians, puts up signs, issues warehouse receipts and goes through other similar forms, while leaving the bankrupt in possession of the property, for consumption and use in his daily business, there is no finding of fact against petitioner, and that it is only necessary to apply the holding of this Honorable Court in Security Warehousing Company v. Hand, 206 U. S. 415, 27 S. Ct. 720, 51 L. Ed. 1117, to the primary and evidentiary facts found and reported by the Master and which have never been controverted by the respondents.

Respectfully submitted,

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